

WHITE PAPER  
ASSURANCES, GUARANTEES, AND LEGAL-INSTITUTIONAL CHANGES  
for the  
CALFED BAY-DELTA PROGRAM  
July 8, 1996

The purpose of this white paper is to clarify what has been termed the "assurances" issue or the "guarantees" issue or the "legal-institutional" issue in the CalFed Bay-Delta Program.

**What is the problem?**

The problem is that several major interest groups fear that the Delta solution, developed by the CalFed Bay-Delta Program, will not be carried out as intended.

Different groups have different fears. For example, Delta exporters fear that any facilities built in the Delta (and paid for by them) will not deliver anticipated amounts of water because of future environmental requirements. Environmental interests, on the other hand, fear that exporter interests could change or over-ride environmental requirements and operate the facilities to further damage the Delta environment.

So, assurances are needed to calm or eliminate the fears that the Delta solution will not be carried out as anticipated or that this solution poses a threat that would not exist in the absence of the solution.

Note that there is another kind of assurance that is also important. These are the assurances that the Delta solution will have (or not have) some particular feature. For example, many interests want to be assured that the Delta solution

will have a comprehensive ecosystem program. Many interests want assurances that the Delta solution will provide for more Delta exports. Other interests want assurances that the Delta solution will include substantial programs for efficient water use. Everyone is interested in a fair system of allocating costs.

However, this second kind of assurance is different from the ones needed to address fears. This second kind concerns the specific components of the Delta solution. The first kind mentioned above concerns whether the solution will be carried out as anticipated.

The second kind of assurance will either be provided by the Delta solution or it will not. Once the specific components are known, various interest groups can decide whether they support the solution or not. If these groups oppose the solution because it contains (or does not contain) some feature that they value, and if this opposition is formidable enough, then that particular solution will have to be modified to make it acceptable.

In other words, this second kind of assurance will be worked out in the process of developing the Delta solution.

Discussion of the "assurance" issue is often obscured by mixing of these two kinds of assurances. They are fundamentally different. The first kind has proven to be more elusive. Many of the people involved in the CalFed Bay-Delta Program are beginning to realize that the success of the program rests on our success in developing the first kind of assurance and that without those assurances, the program is not likely to be successful.

This white paper addresses the first kind of assurance, that is, the assurance that the CalFed Bay-Delta Program solution will be carried out as intended and will not pose a threat to any of the major interests.

### **"Assurances" or "Guarantees?"**

Guarantees are assurances but assurances are not necessarily guarantees. Assurances may be adequate for some concerns. Guarantees, or something approaching guarantees, may be needed for other concerns. Maybe mutual assurances would be sufficient for contrary fears whereas something approaching a guarantee would be necessary to allay one of those fears by itself.

It would seem to be prudent to use the term "assurances" rather than the term "guarantees" to avoid an implicit degree of permanence or certainty that may not be necessary in all cases.

### **Assurances and Legal-Institutional Changes**

Legal-institutional change may be one way to provide a particular assurance or group of assurances. Such assurances might well be provided with no legal-institutional change.

A new institution would be a creature of the State Legislature. Therefore, because much of the state's population is served by Delta exports (everything south of Hayward), then one could argue that a new institution does not provide much assurance, unless such an institution were some sort of joint federal-state creature.

Legal-institutional changes might be desirable for reasons other than to provide assurances. For example, maybe an institutional change would be needed to afford better management of the Bay-Delta system.

Therefore, the "assurance" issue and the "legal-institutional" issue are not the same. They are two different issues with some possible overlap. The overlap is the possibility that legal-institutional change may be a good way to provide an assurance(s).

In the last several years, whenever the assurance issue has been addressed, it has been called and addressed as the legal-institutional issue. This has led to considerable confusion and lack of focus. This implicit merging of what are really largely two separate issues has been one reason that so little progress has been made in developing much-needed assurances.

Therefore, it would seem appropriate to separate these issues. The assurance issue must be dealt with. The legal-institutional issue is only a possibility.

Any significant legal-institutional change is likely to be a tough go, involving fierce bureaucratic infighting and considerable legislative activity. Pursuing such change should not be ruled out, but it should be pursued with caution. It would seem to be unwise to make such change a pre-requisite for all or part of the Delta solution unless it appeared that such change could be made without serious opposition.

### Real assurances?

Could real assurances be developed? Many think not. They point to past efforts, to promises broken, and conclude that real assurances are an impossibility. Others might downplay the possibility of real assurances because such assurances would remove the rational basis for long-held political positions.

Examples of assurances, such as state legislation, are typically put forth as examples of the impossibility of developing assurances. The fact is that such legislation is a relatively poor form of assurance. It could be changed or eliminated by a majority vote of the state legislature, more than half of whose members represent areas served by Delta exports. Obviously, we must do better than that.

The fact is that in only one case has this issue been addressed head on, with the expressed intent of developing long-term assurances that had a high degree of permanence. Is there any way to provide real assurances?

The answer is yes.

This question was addressed by a special committee of attorneys in the old Three-Way Process. These attorneys represented both environmental and water interests. They ruled out state legislation and changes to the state constitution (requiring a two-thirds vote) as inadequate.

They agreed that a two-tiered system of assurances provided the most permanence. The first tier would be a multi-party contract among state and federal operation and regulatory agencies with at least one private party (for example, an

environmental organization) to insulate the contract against state legislative tampering.

The second tier would be federal legislation incorporating the specific provisions of the multi-party contract. Such legislation would have to be a package deal, delivered to Congress with all parties in agreement and with the proviso that any modification by Congress would invalidate the deal.

Such a two-tiered system would require that any interest group(s) wanting to unilaterally change the assurances would have to breach the contract, opening the possibility for enforcement of the assurances by a court, and then convince both houses of Congress and the President to change the assurances.

Modifications to this two-tiered form could also be explored.

Of course, one key question is whether such a two-tiered form could be developed and carried through. Intentionally leaving out the state legislature and delivering a "hands off" deal to Congress and the President is not without special problems. But, if assurances are needed and if legal-institutional change is deemed to be too unreliable in the long run and/or too difficult in the short run, then something like this two-tiered system would be worth exploring.

**What has to be assured?**

This, of course, depends on what the major interest groups want to have assured. However, a preliminary, "bare bones" list of assurances flows logically from concerns over the

specific components of the CalFed Bay-Delta Program. These concerns are:

1. For upstream interests: That the Delta fix will allow export users to take water from upstream areas or that future environmental requirements will take some of their water, thereby undercutting their economic base and threatening their long-term water supply
2. For environmental/fishery interests: That long-term funding for the Ecosystem Program will be reduced or eliminated
3. For environmental/fishery interests: That the water use efficiency programs will not be carried out as specified in the Water Use Efficiency Programs
4. For environmental/fishery interests: That Delta conveyance facilities will be mis-operated to the detriment of the environment
5. For Delta interests: That the "System Integrity" Program, that is, the levee stability part of it, will not be carried out as intended
6. For Delta interests: That the quality of water in Delta channels will not be maintained at levels specified in the final Delta plan
7. For Delta exporters: That the water supply and water quality benefits of new Delta facilities will be curtailed by future environmental requirements.

Carrying the two-tiered assurances idea a little farther, the multi-party contract and accompanying federal legislation would have seven key provisions, each provision addressing one of the above concerns.